STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2008
v	No. 272743 Shiawassee Circuit Court
KENNETH BRIAN ALLISON, Defendant-Appellant.	LC No. 05-002609-FH

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with person under 13 years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with person under 13 years of age) and MCL 750.520c(1)(b) (sexual contact with person 13 to 16 years of age and actor is related to the victim). He was sentenced to imprisonment for 8 to 18 years for the CSC I conviction, 5½ to 15 years for one of the CSC II convictions (MCL 750.520c(1)(a)), and 4½ to 15 years for the other CSC II conviction (MCL 750.520c(1)(b)). Defendant appeals as of right, and we affirm.

I. Facts

Defendant's convictions arose out of his improper sexual contact with his daughter. At the time of trial in February 2006, the victim was 17 years old. The victim testified regarding four separate incidents in which defendant sexually abused her in the family home. The incidents were all similar, with some minor differences. Each time, defendant grabbed the victim's waist, pulled down the victim's pants, as well as his own, and rubbed his penis on her buttocks. Sometimes, he ejaculated on the victim's back. On one occasion, defendant digitally penetrated the victim's rectum. Although the victim was not certain how old she was when these incidents occurred, it is apparent from her testimony that they occurred over a period of about four to five years, when she was approximately 9 to 13 years old. The victim also testified regarding a fifth incident that occurred one morning before she left for school in which defendant grabbed her around the waist in the living room and pushed her down so that she was facing the couch. At this point, the victim began wrestling with defendant and was able to "pull away" and leave the house.

The credibility of the victim was an issue at trial. The victim admitted that she lied and told her boyfriend that she had been raped by her brother's friend. She also admitted that she lied and told a girlfriend that she had been raped. Defendant presented numerous witnesses, including family members, friends, and the family's pastor, whose testimony tended to impeach the victim's credibility. Defendant also testified on his own behalf. Defendant denied all of the victim's allegations. He denied ever placing his finger in the victim's rectum, and he denied ever rubbing his penis on the victim's buttocks. He stated that he and his wife tried to figure out where the allegations came from and ultimately concluded that the victim must have had a bad dream.

II. Analysis

A. MRE 404(b) Evidence

Defendant first argues that the trial court abused its discretion in admitting evidence that while defendant and the victim were on a trip to California alone, defendant wrestled with the victim on a bed in a hotel room and tried to pin her down. According to defendant, this evidence should have been excluded based on MRE 403 and MRE 404(b). Plaintiff argues that the evidence was admissible under MRE 403, MRE 404(b), *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973), and MCL 768.27a.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). The abuse of discretion standard recognizes that "'there will be circumstances in which . . . there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The evidence at issue concerned a trip that defendant and the victim took to California together in the summer of 2004. It was the victim's dream to take surfing lessons. She learned of a one-day surfing camp in San Diego, California, and she wanted to attend. The victim discussed taking the trip with her mother, but her mother would not go on the trip and suggested to the victim that defendant could take her. The victim stated that she told defendant that she wanted to go on the trip, and defendant investigated the cost, and they made travel and hotel reservations. The victim stated that she was nervous and "[n]ot very excited" to take the trip alone with defendant, but that she "was just thrilled that I was gonna go surfing." When asked if she was concerned about traveling with defendant, she stated that by that time, defendant had "stopped doing things to me . . . [a]nd . . . I figured it would be fine to go with him, nothing would happen." She asserted that she "really, really wanted to go surfing" and that she did not think anything would happen because "[i]t had been so long since he had done anything, so I thought everything would be okay."

As required by MRE 404(b)(2), the prosecutor provided notice of its intent to introduce MRE 404(b) evidence more than four months before trial. The lower court record indicates that the prosecutor and defense counsel discussed the 404(b) evidence in the trial court's chambers and that the prosecutor originally agreed not to introduce the 404(b) evidence, not because she

believed that it was inadmissible under the court rule, but because she knew that if the trip came up at trial, defendant would use the trip to impeach the victim's credibility by noting the inconsistency in the victim claiming that she was afraid to be alone with defendant and at the same time insisting on taking a trip alone with defendant. According to the prosecutor, her initial inclination not to use the 404(b) evidence was a matter of trial strategy because she knew that defendant would use the trip to impeach the victim's credibility. Therefore, the prosecutor agreed in chambers not to bring up the California trip unless defendant opened the door.

At trial, during cross-examination, defense counsel brought up the subject of the California trip and questioned the victim about the trip. The prosecutor then sought to admit the 404(b) testimony about defendant wrestling with the victim on the bed in the hotel room in California. The trial court ruled that the evidence was admissible, and the victim testified:

> I woke [defendant] up, and I told him I was going to go swimming, and that's when he pulled me towards the bed that he was laying in, and we just started wrestling, and he started trying to pin me up against the bed, and I just wrestled with him. I eventually was able to get away, and I just walked out of the hotel room.

Under MRE 404(b), evidence of a defendant's other crimes, wrongs or acts is generally inadmissible in a criminal prosecution to prove that the defendant possessed a propensity to commit such acts. *People v Hall*, 433 Mich 573, 579; 447 NW2d 580 (1989). MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The purpose of the rule is to prevent a "'conviction based upon a defendant's history of other misconduct rather than upon the evidence of his conduct in the case in issue.'" *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998), quoting *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). MRE 404(b) is a rule of inclusion, which means that a trial court may "admit other acts evidence *whenever* it is relevant on a noncharacter theory," *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993) (emphasis in original), amended 445 Mich 1205 (1994), subject to certain limitations. In order for evidence to be admissible under MRE 404(b), the following three-prong test must be met: First, the other acts evidence must be for a purpose other than a character or propensity theory. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). Second, the evidence must be relevant to an issue of fact that is of consequence at trial. *Id.* Third, under MRE 403, the danger of undue prejudice must not substantially outweigh the probative value of the evidence. *Id.* at 55-56. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 56.

Under the first prong, we must determine whether the evidence was admitted for a proper purpose. Defendant argues that this prong was not met because the prosecutor sought to admit

the MRE 404(b) evidence to punish defendant for impeaching the victim's credibility by cross-examining her about the fact that despite her claims that defendant sexually abused her, she still asked defendant to take her to California and then went with him alone on the trip. Therefore, defendant contends, the prosecutor sought to admit the evidence for an improper purpose under MRE 404(b). This argument is not supported by the record. As noted above, the prosecutor always believed that the evidence was admissible under MRE 404(b), but decided not to use the evidence unless defendant brought it up for reasons involving trial strategy. Proper purposes for admitting evidence under MRE 404(b) include proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act. MRE 404(b)(1). In this case, admission of the evidence was proper for most, if not all, of these purposes. First, defendant's scheme or system in molesting the victim included preying on her when the two of them were alone and physically dominating her by grabbing her and removing her pants. On one previous occasion in the family home, defendant had attempted to wrestle the victim in an apparent attempt to remove her pants and sexually abuse her. The incidents were all sufficiently similar to constitute defendant's plan, scheme or system in sexually abusing his daughter. The fact that the charged and uncharged acts were dissimilar in some respects does not negate the finding of a plan, scheme or system to do the acts. See *id.* at 67.

Defendant contends that the fact that the California incident occurred a long time after the conduct that is the basis for the criminal charges against defendant is relevant to determining whether the evidence was admitted for a proper purpose under MRE 404(b). Defendant suggests that the California incident occurred a long time after the charged conduct, but does not assert how much later and does not assert the victim's age at the time of the California trip. While the victim acknowledged that she could not recall her exact ages when she was assaulted, her testimony established a range of about five years, from when she was 9 years old until she was about 13 years old, when defendant sexually assaulted her. Even if the California incident occurred one, two or three years after the last time defendant sexually assaulted the victim, given the approximate five-year span during which defendant sexually assaulted or attempted to sexually assault the victim in the family home, we reject defendant's contention that the amount of time that elapsed rendered the evidence inadmissible.

We must next determine whether the evidence was relevant under MRE 402. *Id.* at 55. "All relevant evidence is admissible" under MRE 402. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that defendant wrestled with the victim on the bed in the hotel room in California and tried to pin her down is relevant to whether the charged conduct occurred. The California evidence was similar to the charged conduct in that the some of the charged conduct involved defendant wrestling with the victim and attempting to physically dominate her while the two of them were alone in the family home; the California evidence therefore tended to show defendant's plan, scheme or system in abusing the victim. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 57.

The third determination regarding the admissibility of MRE 404(b) evidence involves determining whether the evidence is unfairly prejudicial under MRE 403. *Id.* at 55-56. At trial,

there was evidence that defendant, on multiple occasions, removed the victim's pants and his own pants and rubbed his penis on the victim's buttocks. The victim testified that on some of these occasions, defendant ejaculated on her back. There was also evidence that defendant digitally penetrated the victim's rectum on one occasion. This evidence would likely inflame the passions of the jurors much more than evidence that defendant merely wrestled with the victim on a bed in a hotel room. The victim's MRE 404(b) testimony was that defendant wrestled with her and tried to pin her down. She did not testify that defendant sexually assaulted her. The victim's testimony regarding the charged acts was much more graphic and descriptive than the MRE 404(b) testimony and included the victim's descriptions of defendant's sexual abuse of her when she was as young as nine years old. Evidence that defendant wrestled the victim and tried to pin her down was not unfairly prejudicial given the graphic nature of the victim's testimony regarding the charged conduct. The trial court did not abuse its discretion in refusing to exclude the evidence under MRE 403.

Furthermore, when the trial court instructed the jury, it gave a limiting instruction under MRE 105. In its limiting instruction, the trial court specifically instructed the jurors that they could not consider the evidence to conclude that defendant was a bad person or that he was likely to commit crimes and that it could not convict defendant because they thought he was guilty of other bad conduct. A jury is presumed to follow the trial court's limited use instruction. *People v Frazier (After Remand)*, 446 Mich 539, 542; 521 NW2d 291 (1994). The trial court's limiting instruction protected defendant's right to a fair trial. *People v Smith*, 243 Mich App 657, 675; 625 NW2d 46 (2000).

Defendant argues that in seeking to admit the MRE 404(b) evidence, the prosecutor made an inaccurate offer of proof to the trial court because in the offer of proof, the prosecutor referred to defendant wrestling the victim on a bed "and trying to get her pants off," but the victim's testimony did not include any assertions that defendant tried to remove her pants in California. In making her offer of proof, the prosecutor stated that she did not "want to misquote" the victim's assertions regarding what happened in California; she plainly was describing the general nature of what she anticipated the victim's testimony would be, and not the precise substance of what the victim's testimony would be. Her comments clearly indicated that she did not intend to assert the content of the victim's testimony verbatim. Defendant's contention is meritless.

The prosecutor argues that in addition to MRE 404(b), the California evidence was also admissible under *DerMartzex* and MCL 768.27a. However, neither of these arguments were raised before or addressed by the trial court and are therefore not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Furthermore, because the trial court properly ruled that the evidence was admissible under MRE 404(b), this Court need not decide whether it was also admissible under *DerMartzex* and MCL 768.27a.

B. Exclusion of Evidence

Defendant next argues that the trial court abused its discretion in precluding the victim's brother from testifying that the victim did not express or indicate to him that she was concerned about being alone with defendant. At trial, defense counsel asked the victim's brother, who testified for the defense, questions about the victim's attitude about the trip to California with defendant. Defense counsel asked the victim's brother if the victim was excited about going on the trip and if she was excited when they returned from the trip. The victim's brother responded

affirmatively to both questions. The prosecutor made a hearsay objection when defense counsel asked the victim's brother the following question: "Did [the victim] ever express to you, or indicate to you, in any way, a concern that she had about being alone with [defendant]?" The trial court sustained the objection. Defendant asserts on appeal that the victim's response to defense counsel's question was admissible under MRE 803(3). However, defendant did not argue that the evidence was admissible on this basis at trial; after the trial court sustained the prosecutor' objection, defense counsel said simply: "Nothing further. Thank you." Because defendant did not raise the MRE 803(3) argument before the trial court, the trial court did not address the issue; therefore, this issue is not preserved for review. *Fast Air, Inc*, *supra* at 549. In any event, at least three other defense witnesses testified that the victim was excited about the trip to California, enjoyed the trip, or did not seem concerned about being alone with defendant. The testimony that defendant asserts was improperly excluded would have been merely cumulative to other properly admitted evidence. Any error was therefore harmless and did not affect defendant's substantial rights. MRE 103(a)(1); *People v Crawford*, 187 Mich App 344, 353; 467 NW2d 818 (1991).

Defendant also argues that the trial court abused its discretion in excluding a portion of the testimony of Shirley Sherman, which defendant contends would have shown the victim's plan to fabricate allegations against defendant. Sherman, defendant's aunt, also testified for the defense. Sherman responded affirmatively when asked if she believed that the victim and her boyfriend "were cooking up this whole thing[.]" When defense counsel asked Sherman what she heard that caused her to believe the victim was fabricating the allegations, Sherman began to testify: "And . . . when we were at the hearing for [the victim], after she had gone in and testified, she came out and said—". At this point, the prosecutor made a hearsay objection. Defense counsel asserted that the testimony was admissible as an admission by a party. The trial court ruled that the evidence was inadmissible hearsay.

On appeal, defendant argues that Sherman's response should have been admitted based on MRE 803(3). However, defendant did not argue to the trial court that the evidence was admissible under MRE 803(3), and the trial court did not decide whether the evidence was admissible under MRE 803(3). Therefore, this issue is not preserved for review. *Fast Air, Inc, supra* at 549. The trial court's preclusion of this evidence did not constitute error affecting defendant's substantial rights, MRE 103(1)(a), because if the evidence had been admitted, its effect would have been to impeach the victim's credibility and cast doubt on the victim's allegations against defendant. The testimony of numerous other defense witnesses, including the victim's own family members, impeached the victim's credibility. The absence of a portion of Sherman's testimony did not substantially affect defendant's rights when the testimony of numerous other defense witnesses impeached the victim's credibility.

C. Rape-Shield Statute

Defendant argues that the trial court abused its discretion in precluding a portion of the victim's testimony based on the rape-shield statute, MCL 750.520j. This Court reviews the trial court's decision to exclude evidence under the rape-shield statute for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

The rape-shield statute, with certain specific exceptions, excludes evidence of the victim's sexual conduct with persons other than the defendant. MCL 750.520j; *People v Arenda*,

416 Mich 1, 10; 330 NW2d 814 (1982). The prohibitions in the rape-shield statute represent a legislative determination that, in most cases, such evidence is irrelevant. *Arenda*, *supra* at 10. The rape-shield statute provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j (footnote omitted).]

At trial, defense counsel asked the victim: "Isn't it true that they [the victim's parents] expressed concern that you were sexually active with [the victim's boyfriend]?" The prosecutor objected based on the rape-shield statute, and the trial court sustained the objection. The testimony that defense counsel sought to elicit from the victim is testimony that would have suggested or confirmed that the victim engaged in consensual sexual activity with her boyfriend. This is precisely the type of evidence that the rape-shield statute seeks to prohibit. MCL 750.520j(1); *Adair*, *supra* at 480. Admitting this type of evidence poses a danger of unfairly prejudicing and misleading the jury, *Arenda*, *supra* at 10, and might discourage sexual assault victims from testifying because of a fear that their private lives will be cross-examined. *Adair*, *supra* at 480. Moreover, the testimony sought to be elicited by the prosecutor clearly does not come within the exceptions articulated in MCL 750.520j(1)(a) and (b). Despite the prosecutor's objection, the victim actually responded to defense counsel's question in the negative and also stated that she and her boyfriend "never got that serious" and that they were never intimate. Thus, the trial court's ruling in response to the prosecutor's objection based on the rape-shield statute ultimately did not have the effect of excluding any evidence. We also note that the trial court specifically gave defendant the opportunity to revisit the issue, but defendant did not do so. Furthermore, defendant himself concedes that the trial court's exclusion of this evidence alone would not be a ground for reversal. The trial court did not abuse its discretion in ruling that the testimony defense counsel sought to elicit from the victim was not admissible under the rape-shield statute.

D. Prosecutorial Misconduct

Defendant next argues that numerous instances of prosecutorial misconduct deprived him of a fair trial. Generally, this Court reviews de novo a claim of prosecutorial misconduct. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). However, if a defendant failed to preserve the issue by objecting at trial, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must show that: (1) there was an error; (2) the error was plain, i.e., clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. *Id.* at 763. Reversal is then warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness,

integrity or public reputation of judicial proceedings. *Id.*; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor generally has great latitude regarding their arguments and conduct and is free to argue the evidence and all reasonable inferences therefrom as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant first argues that the prosecutor deliberately elicited double hearsay testimony from the victim. The prosecutor was questioning the victim about her mother's response when the victim informed her that her father had sexually abused her:

Q.[Prosecutor] Mr. Shafer asked you about when you told your mom on Christmas night.

A.[Victim] Yes.

Q. He asked you if she expressed any doubts about what you were telling her.

A. Yes.

Q. And, you said no. Was she supportive of you that very first night?

A. Yes. I could quote what she told me.

Q. And, what did you—when you—after you talked with her that night, what did you feel was gonna happen?

A. She had told me that she—

[Defense Counsel]: Objection, it's hearsay.

[Prosecutor]: I can rephrase that.

[Defense Counsel]: I think—nevermind [sic]. I'll withdraw it. Go ahead.

Q. What'd she tell you?

A. She told me that she would file for divorce tomorrow and we would build our own castle.

THE COURT: I couldn't hear the answer.

Q. Could you speak up a little bit?

A. She told me that she would file for divorce tomorrow and we would build our own castle. That's what she said. And, the next day she talked to my dad, and she told me that he had said he didn't remember, and then that was all she said to me.

Q. And, the last part, she said he said he didn't remember, and what?

A. That's all she said to me.

Contrary to defendant's contention, the prosecutor did not deliberately or purposefully elicit double hearsay testimony. The prosecutor's questions to the victim concerned the victim's mother's response to being informed that the victim's father had been sexually abusing the victim. The prosecutor asked a very broad and open question: "What'd she [the victim's mother] tell you?" The prosecutor only asked this question after the victim stated that she could quote what her mother told her in response to the prosecutor asking the victim if her mother was supportive of her. The prosecutor's question was a response to the victim's testimony. Moreover, it did not require a hearsay response because the prosecutor was not asking the question to prove the truth of the matter asserted in the response. The prosecutor was seeking to determine whether the victim's mother believed the victim's allegations against defendant, not to determine whether the victim's mother was really going to divorce defendant and build a castle. Prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Furthermore, while defendant initially objected when the victim began to testify regarding what her mother told her, defendant withdrew the objection. Because defendant did not make an objection based on the evidence or prosecutorial misconduct, this Court's review is for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. This small portion of the victim's testimony did not affect the outcome of the proceedings. Additionally, any undue prejudice could have been cured by a timely objection and a request for a curative instruction. *People v Moorer*, 262 Mich App 64, 78-79; 683 NW2d 736 (2004). Thus, defendant's claim regarding this instance of prosecutorial misconduct does not warrant reversal on appeal

Defendant next argues that the prosecutor improperly asked the victim if defendant ever went to church. According to defendant, this evidence was irrelevant and was elicited to suggest the inference that defendant did not have religious beliefs that would encourage him to tell the truth. Because defendant did not object, reversal is warranted only if plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, *supra* at 763.

A prosecutor may not inquire about a witness' religious beliefs or about those beliefs' effect on truthfulness. MCL 600.1436; MRE 610; *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007). MCL 600.1436 provides, in relevant part: "No witness may be questioned in relation to his opinions on religion, either before or after he is sworn." In addition, MRE 610 provides that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

The victim testified as follows in response to the prosecutor's questions regarding whether she and her parents attended church:

Q. [Prosecutor] Did you go to [sic] church?

A. [Victim] Yes, I did. Not regularly.

Q. Not very what?

A. Not regularly. But, I didn't—

Q. Who would you go to church with?

A. Usually my mom.

Q. Would your dad ever go?

A. No.

Q. Did you go to [sic] classes at church?

A. Yes, I did.

Q. Like Sunday school type classes?

A. Confirmation.

Q. Confirmation class. And, did you actually go through that and become confirmed?

A. I did.

The prosecutor did not inquire about defendant's religious beliefs or opinions or suggest that defendant should not be believed because of a lack of religious beliefs. The victim's testimony did not reveal defendant's opinion or belief regarding the subject of religion. In addition, the prosecutor did not argue during closing argument that the fact that defendant did not attend church made his testimony less credible. The prosecutor's questioning was not improper and did not elicit any improper testimony. Reversal is not required if the testimony elicited did not reveal the defendant's opinion or belief regarding the subject of religion. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

Defendant finally argues that the prosecutor shifted the burden of proof to defendant during closing argument when she made the following arguments during closing argument:

> Actually . . . we know that [the victim] struggled in school with headaches, with fainting, with health issues. That frankly, we have no other explanation for other than dad's molesting me. . . .
>
> * * *
>
> We heard from Bonnie and we heard from Dan, the two school personnel. They both sensed something wrong. Dan in middle school. She was not a happy-go-

> lucky girl. She did not seem to always be happy. She had all these health issues. There was no explanation for the health issues. It fits.

The prosecutor's comments during closing argument did not shift the burden of proof to defendant. The statements were a proper comment on the testimony of Daniel Hare and Bonnie Wilson. A prosecutor is free to comment on the evidence and all the reasonable inferences therefrom. *Bahoda*, *supra* at 282. Furthermore, defendant attempted to establish that the victim's behavior changed after she met her boyfriend in high school. Evidence that the victim was unhappy and had health issues in middle school, before she met her boyfriend, would cast doubt on defendant's theory that the victim's behavior only changed after she began dating her boyfriend in high school. A prosecutor is permitted to attack the weakness in the defendant's version of what happened. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). In addition, the trial court instructed the jury that the prosecutor always has the burden of proving all the elements of the offenses beyond a reasonable doubt and that the defendant was not required to prove his innocence, produce any evidence, do anything. Any possible error was dispelled by the trial court's instruction. *Bahoda*, *supra* at 281.

E. Jury Instructions

Defendant argues that the trial court erred in failing to instruct the jurors that if they took notes, their note taking should not interfere with their attentiveness. Claims of instructional error are reviewed de novo on appeal. *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). Even if somewhat imperfect, jury instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id.* Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *id.* Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. *Meyer v Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000). Because defendant did not object to the challenged instruction at trial, this Court's review is for plain error. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350; 660 NW2d 361 (2003), aff'd and remanded 471 Mich 540 (2004).

MCR 6.414(D) provides, in relevant part:

> **Note Taking by Jurors.** The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes and that they should not permit note taking to interfere with their attentiveness. . . .

The trial court's instructions to the jury regarding note taking did not include an instruction that the jurors were not to permit note taking to interfere with their attentiveness. However, defendant does not contend, and there is no evidence to suggest, that one or more jurors' note taking interfered with their attentiveness. Thus, defendant was not prejudiced by the omission in the trial court's instruction. *Carines*, *supra* at 763. Moreover, if defendant had objected to the instruction, the trial court could have properly instructed the jury, which would have cured any error. *Bahoda*, *supra* at 285 n 48. Even though somewhat imperfect, reversal is not required because on balance, the applicable law was adequately and fairly presented to the jury. *Jackson*, *supra* at 647.

F. Cumulative Error

Defendant finally argues that the cumulative effect of the combination of prosecutorial misconduct and prejudicial evidentiary decisions rendered the trial fundamentally unfair and violated his due process rights. This Court reviews a claim regarding the cumulative effect of errors to determine if the errors were so prejudicial that defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). The cumulative effect of several errors may warrant reversal even when one error standing alone does not require reversal. *People v Miller (After Remand)*, 211 Mich App 30, 44; 535 NW2d 518 (1995). Only actual errors may be aggregated to determine the cumulative effect. *Bahoda*, *supra* at 292 n 64. The only error at trial concerned the trial court's MCR 6.414(D) instruction. Because there was only one error, there were not multiple errors to aggregate, and reversal under a cumulative error theory is not warranted. Defendant's argument is without merit.

III. Holding

For the reasons articulated in this opinion, we find defendant's arguments on appeal to be without merit.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher